IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 09-0487

VALERIE EMMERSON,

Petitioner and Appellant,

v.

WALLACE C. WALKER and RANA RAE WALKER,

Respondents and Appellees.

WALLACE C. WALKER and RANA RAE WALKER,

Third-Party Plaintiffs and Appellees,

vs.

S. TUCKER JOHNSON,

Third-Party Defendant and Appellant.

On Appeal from Montana Sixth Judicial District Court, Sweet Grass County
Cause No. DV 2007-8, Hon. Wm. Nels Swandal

APPELLANT'S OPENING BRIEF

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STATEMENT OF ISSUES

(1) Whether the act of advising or inducing a party to a contract to take perfectly legal action (in this case filing a declaratory action seeking interpretation of the contract) can serve as a basis for tortious interference with contract.

(2) Whether the district court erred when it held that a person is liable for tortious interference for advising or inducing someone to resolve a contract dispute by filing a declaratory judgment action (*i. e.*, to exercise her constitutionally-protected right to seek redress through the courts), and paying her legal fees, where there was no finding that the litigation was filed maliciously or constituted an abuse of process.

STATEMENT OF THE CASE

This case arises out of a contract dispute. On May 15, 2006, Valerie Emmerson entered into an agreement with Wallace and Rana Rae Walker, pursuant to which Emmerson agreed to exchange her property for property owned by the Walkers. [*See Court's Findings of Fact, Conclusions of Law and Order* (the "Order"), Case Register Report ("CRR")[1] 99, at 7.] Soon after that agreement was executed, Emmerson decided that her property was worth more than the Walkers' property. [Transcript of Proceedings (the "Transcript"), 21-23.] Emmerson attempted to renegotiate the

[1]A copy of the CRR and the court's Order are attached as Appendices 1 and 2, respectively.

agreement, but the Walkers refused to do so. [*Id.*, at 23.] Later, in October 2006, Emmerson received an offer for her property from Tucker Johnson. [Order, CRR 99, at 9-10.] At that time Johnson was unaware of the Walker/Emmerson Land Exchange Agreement, and believed that Emmerson's property was for sale because the "for sale" sign was still on Emmerson's property. [Transcript, 210; *see also* Order, CRR 99, at 23.] Convinced that her agreement with the Walkers was unfair, Emmerson sought the assistance of the courts. On February 28, 2007, Emmerson filed a *Petition for Declaratory Judgment Pursuant to Rule 57, M.R.Civ.P., and MCA § 27-8-301 et seq.* (the "Petition"), in Montana's Sixth Judicial District, Sweet Grass County. [*See* CRR 1.] The Petition named the Walkers as Respondents, and asked that the court declare the parties' agreement void under the Uniform Declaratory Judgment Act, MCA § 27-8-101, *et seq.* [*See id.*, ¶ 7.]

The Walkers later filed a Third Party Complaint against Johnson. [*See Third Party Complaint as Against S. Tucker Johnson*, CRR 21.] The Walkers sued Johnson for tortious interference with contract and negligent and intentional infliction of emotional distress. [*Id.*] Johnson counterclaimed against Walkers on the same theories, as well as abuse of process. [*See Answer; Affirmative Defenses; and Counterclaims of Third Party Defendant*, CRR 26.]

The matter was tried before the district court, sitting without a jury. [Order,

CRR 99, at 1.] By Findings of Fact and Conclusions of Law dated May 12, 2009, the court found the Emmerson/Walker Land Exchange Agreement valid and enforceable and ordered Emmerson to consummate that agreement. [*See id.*, at 26.] The Walkers did not allege, and the court did not find, that Emmerson's lawsuit constituted malicious prosecution or an abuse of process, but did order Emmerson to pay Walkers' attorneys' fees based on the attorneys fees provision of the contract. [Order, CRR 99, at 23.] Although the court specifically found ***no malice*** by Johnson, it nevertheless held that Johnson, by inducing Emmerson to file the declaratory judgment action, tortiously interfered with the agreement between Emmerson and the Walkers. [*See* Transcript, 310; Order, CRR 99, at 27.] The court awarded the Walkers a total of $150,000 in emotional distress damages against Johnson.

Johnson timely filed a *Notice of Appeal*. [*See Notice of Appeal,* dated August 28, 2009.] He raises only the issue of the propriety of the damages awarded against him. A mediation is scheduled for December 10, 2009.

STATEMENT OF FACTS

In October 2006, Tucker Johnson visited Montana in search of property for him and his family. [*See* Order, CRR 99, at 9.] While traveling by Emmerson's property north of Big Timber, Johnson noticed a "for sale" sign and concluded the property was for sale. [Transcript, 210; *see also* Order, CRR 99, at 9-10.] Don Vaniman, the

real estate broker showing property to Johnson, also indicated that the property was for sale. [Transcript, 212.] On October 27, 2006, after visiting Emmerson's property, Johnson, through Vaniman, offered to purchase the property. [*See* Order, CRR 99, at 9-10.]

In spite of the "for sale" sign on Emmerson's parcel in October 2006, and unbeknownst to Johnson, Emmerson was a party to an agreement with Wallace and Rana Walker dated May 15, 2006 (the "Walker/Emmerson Agreement"). [*See id.*, at 7.] Pursuant to that agreement, Emmerson had agreed to exchange her 480-acre parcel for property owned by the Walkers. [*See id.*, at 6-7.] The Walker/Emmerson Agreement was contingent on (1) Emmerson constructing a fence around her property and (2) Emmerson receiving an access easement from the State Lands Board. [*See* Appendix 3, Walker/Emmerson Agreement, at 2.] However, the agreement did not include any deadline for the completion of those contingencies, and therefore, the agreement could have continued into perpetuity if the Walkers so desired. [*See id.*, at 2 (providing that if Emmerson did not meet the contingencies, the Walker/Emmerson Agreement would "no longer be in force and effect, unless Walkers desire to proceed" and that "[s]uch decision is solely within Walkers' discretion").] While the Walker/Emmerson Agreement also stated that the deal would close 60 days after the easement was granted, that closing date was illusory because

it hinged on the easement contingency being met, and there was no deadline for Emmerson to receive the access easement. [*See id.,* at 2.] Emmerson contends that in late summer 2006, she told the Walkers she wanted to renegotiate the Walker/Emmerson Agreement, but the Walkers refused to do so.[2] [*See* Transcript, at 21-23.]

In the fall of 2006, after Johnson offered to buy Emmerson's property, he learned of the Walker/Emmerson Agreement. [*See* Order, CRR 99, at 12-13.] In late December 2006 or early January 2007, Emmerson and Johnson met to discuss Johnson's offer. [Transcript, 223-224.] At that meeting, Emmerson told Johnson that she felt "bad about the situation she was in [and felt] bad about the disparate values" between her property and the Walkers' property. [*Id.,* at 224-225.] Johnson suggested that Emmerson seek independent legal advice to determine the validity of the Walker/Emmerson Agreement. [*See id.*, 231.]

Between December 2006 and January 2007, Emmerson sought the advice of two attorneys, at least one of whom opined that the Walker/Emmerson Agreement

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[2]The Walkers claim that Emmerson did not mention any problems with their agreement until October 27, 2006. [*See Walkers' Proposed Findings of Fact, Conclusions of Law and Order*, CRR 97, at 8.] The district court did not make any findings regarding Emmerson's communications with the Walkers regarding the validity of the Walker/Emmerson Agreement during the summer of 2006. Resolution of that factual issue is not necessary for this Court to decide Johnson's appeal.

was valid. [*Id.*, 56-57; *see also* Order, CRR 99, at 13-14.] The district court, correctly, would not allow specific questions about the advice attorney Jane Mersen gave Emmerson about the Walker/Emmerson Agreement during this time period because such advice is protected by the attorney-client privilege. [*See* Transcript, 50-51.]

Emmerson then retained Johnson's attorney, Karl Knuchel. [*See* Order, CRR 99, at 17.] The record does not reflect what advice Knuchel gave Emmerson about the Walker/Emmerson Agreement (presumably because such advice is privileged), but it is reasonably certain that Knuchel advised her that there was at least a legitimate question about the contract's validity because Knuchel subsequently filed the declaratory judgment action to invalidate the contract on behalf of Emmerson. [*See* CRR 1.] No party alleged that Emmerson's act of filing that action was an abuse of process or malicious. Neither did anyone claim Rule 11, M. R. Civ. P., had been violated.

On January 10, 2007, Emmerson and Johnson entered into a backup agreement regarding Emmerson's property. [*See* Order, CRR 99, at 14-15.] Pursuant to that agreement, if Johnson was able to purchase the Walkers' property that was the subject of the Walker/Emmerson Agreement, Emmerson would then sell her property to Johnson in exchange for $135,000 and the Walkers' property. [*See id.*, at 14-15.]

Emmerson considered her agreement with Johnson a backup offer. [Transcript, 27.]

Johnson told Emmerson that he did not want to interfere with the Walker/Emmerson Agreement, and told Emmerson that if she thought there was a problem with that agreement, she should seek a ruling to determine whether the agreement was valid. [Transcript, 70-71.] Emmerson was informed that the action would take no more than 90 days. [*See id.,* 71.] Johnson also thought that the process would take about 90 days. [*See id.,* 230-231.][3] Johnson knew he could not close on his agreement with Emmerson unless a court determined the Walker/Emmerson Agreement was invalid. [*See id.*, 230-231.] Johnson agreed to pay Emmerson's legal fees for filing the declaratory judgment action to interpret the Walker/Emmerson Agreement. [Order, CRR 99, at 16.]

In late February 2007, Emmerson filed the Petition for Declaratory Judgment. [*See* CRR 1.] More than a year later, the Walkers filed the Third Party Complaint against Johnson, seeking damages for tortious interference with contract, intentional infliction of emotional distress, and negligent infliction of emotional distress. [*See* CRR 21.] Johnson retained attorney Mark Hartwig of Livingston to represent him in

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[3]In fact, Rule 57 of the Montana Rules of Civil Procedure provides: "The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

this case.

In his Proposed Findings of Fact and Conclusions of Law, Johnson argued that he did not intentionally or willfully interfere with the Walker/Emmerson Agreement, that his actions were not calculated to damage the Walkers, and that his actions were not done with an unlawful purpose. [*Third Party Defendant's Proposed Findings of Fact and Conclusions of Law*, CRR 96, at 8.] Johnson further argued that he "had the right to undertake his actions and was justified in his actions." [*Id.*, at 9.] Finally, Johnson argued that it was proper for him to suggest that Emmerson obtain legal advice and for him to provide Emmerson with funds for her legal fees. [*Id.*]

After a judge trial, the court entered its Findings of Facts, Conclusions of Law, and Order. [*See* Order, CRR 99.] The court upheld the validity of the Walker/Emmerson Agreement. [*Id.*, at 21.] The court made no findings that Emmerson had maliciously filed her declaratory judgment action or that the action was somehow an abuse of process.

At the end of the trial, the court dismissed Johnson's counterclaim against Walkers and dismissed Walkers' punitive damage claim against Johnson, finding that there was "obviously, not clear and convincing truth [sic] there is any malice, whatsoever." [Transcript, 310.] Nevertheless, the court found that Johnson tortiously interfered with the Walker/Emmerson Agreement. [*See* Order, CRR 99, at 27.] That

conclusion was based on the following findings of fact:

> 34. Johnson had knowledge that the Emmerson's 480 [acre property] was subject to the Emmerson/Walker Exchange agreement sometime between the end of October and the first part of November, 2006. Johnson had been personally and directly informed by [Mark] Josephson [the Walkers' attorney] that the Walkers had an exchange agreement with Emmerson and that they believed their agreement to be valid and intended to close . . . on the Emmerson 480.
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> 35. In spite of that knowledge, and unbeknownst to Walkers, Johnson continued to pursue ways to acquire [Emmerson's] 480 acres for himself.

[*Id.*, at 12-13.] The court also found that "Johnson had his attorney [Karl Knuchel] write to Mersen [the attorney who drafted the Walker/Emmerson Agreement for Emmerson] and suggest that the agreement was voidable." [*Id.*, at 13.][4] Finally, the court found that Johnson made offers for Emmerson's property after he learned of the Walker/Emmerson Agreement, and "enticed Emmerson to ignore the Walker/Emmerson exchange agreement by increasing the amount" he would pay for Emmerson's property. [*See id.*, at 13, 14, 28.]

The court also found that "Johnson had Emmerson file a lawsuit in her name

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[4]In that letter, which was sent before Emmerson retained Knuchel, Knuchel explained to Mersen that while Johnson was "committed to purchasing [Emmerson's] property," he realized that Emmerson had a contract with Walkers. Knuchel sought Mersen's assistance in resolving the issue. [Walker Trial Ex. R.]

against Walkers to invalidate the [Walker/Emmerson Agreement]" and that Johnson paid Emmerson's fees in connection with that suit. [*See id.*, at 15-16.]

Based on those findings, the court concluded that Johnson's acts were intentional and willful, done without lawful purpose and caused damage to the Walkers, even though it also found that Johnson had not acted with malice. [*See id.*, at 25; *see also* Transcript, 310.] The court did not make any findings regarding whether Johnson's acts were justified, other than to state that "Johnson has no rights under the [Walker/Emmerson Agreement] and no social interest that could be protected. . . ." [*See* Order, CRR 99, at 25.]

The district court, without any concrete evidence of medical or psychological treatment, awarded the Walkers a total of $150,000 for their "emotional distress." [Order, CRR 99, at 27.]

STANDARD OF REVIEW

Only questions of law are at issue in this appeal. The issue to be decided on appeal is whether the district court erred when it failed to recognize the constitutionally-protected right to seek redress through the courts when it found Johnson tortiously interfered with the Walker/Emmerson Agreement by suggesting that Emmerson seek legal advice and by paying Emmerson's legal fees.

This Court reviews conclusions of law *de novo* to determine whether the

district court's interpretation was correct. *See Hidden Hollow Ranch v. Fields*, 2004 MT 153, ¶ 21, 321 Mont. 505, 512, 92 P.3d 1185, 1190. The Court exercises plenary review of constitutional issues. *See State v. Carter,* 2005 MT 87, ¶ 21, 326 Mont. 427, 434, 114 P.3d 1001, 1005.

SUMMARY OF ARGUMENT

Emmerson acted perfectly legally when she filed her declaratory judgment action seeking a court interpretation as to whether her exchange agreement with the Walkers was enforceable. She has the fundamental constitutional right to petition the court for redress of grievances under the First Amendment to the U. S. Constitution and under the Montana Constitution, Art. II, section 16. She also has the statutory privilege under the Uniform Declaratory Judgment Act, MCA § 27-8-203, to seek a construction of a contract before a breach thereof.

Given that Emmerson had a protected legal right to seek a declaratory judgment regarding the validity of the Walker/Emmerson Agreement (and the district court did not find otherwise), Johnson, who at most induced Emmerson to take that constitutionally-protected action, cannot be held liable. *See Eddy's Toyota of Wichita, Inc. v. Kmart Corp.*, 945 F.Supp. 220 (D. Kan. 1996).

This Court, as well as the courts of many other states, have been extremely vigilant in guarding against tort actions which may unnecessarily chill the

fundamental right to seek court redress. In Montana, for example, there are high thresholds that plaintiffs must meet before they can sustain an action for malicious prosecution and/or abuse of process. *See Plouffe v. Mont. Dept. of Pub. Health and Human Servs.*, 2002 MT 64, ¶ 16, 309 Mont. 184,189-90, 45 P.3d 10, 14; and *Brault v. Smith*, 209 Mont. 21, 28-29, 679 P.2d 236, 240 (1984). Further, this Court implicitly recognized the litigation privilege in *Hughes v. Lynch*, 2007 MT 177, ¶ 1, 338 Mont. 214, 215, 164 P.3d 913, 915. This undesirable chilling effect is very evident in this case. The district court awarded the Walkers a total of $150,000 in "emotional distress" damages based on extremely thin testimony about their stress, backed by no concrete evidence of medical or psychological consultations.

The district court's mechanical application of the routine "tortious interference" test, as set forth in the case of *Hardy v. Vision Service Plan*, 2005 MT 232, 328 Mont. 385, 120 P.3d 402, was insufficiently rigorous to protect the fundamental litigation rights of Emmerson and, derivatively, Johnson. Although the district court correctly recited the *Hardy* standard, it failed to apply that standard rigorously and it particularly failed to recognize Johnson's constitutionally-protected right to seek redress through the courts. It failed to recognize and factor into its decision the "social interests in protecting the freedom of action of the actor." *See* Restatement (Second) of Torts, § 767(e); *see also Phillips v. Mont. Education Ass'n*,

187 Mont. 419, 424, 610 P.2d 154, 157 (1980) (holding that "public policy" must be considered before imposing liability for tortious interference).

Finally, to the extent that the court relied upon Johnson's backup offer as evidence of malicious interference, it was erroneous reliance. Backup offers are common in the real estate business and cannot serve as the basis for tortious interference of the initial contract. That is particularly true here, where the backup offer was never accepted and Emmerson did not breach her original contract with the Walkers.

The case must be reversed and remanded.

ARGUMENT

I. JOHNSON'S ACTS WHICH, AT MOST, SIMPLY INDUCED EMMERSON TO SEEK A COURT REMEDY, ARE PROTECTED ACTS THAT ARE NOT ACTIONABLE IN TORT.

Emmerson never breached her contract with Walkers, nor did Johnson induce a breach. Under the version of the facts most favorable to Walkers, all that can be said is that Johnson urged Emmerson to seek a court interpretation (which she did), and he financed her in pursuing her declaratory judgment action. The court ultimately found that the contract is valid and enforceable and awarded Walkers their attorneys' fees pursuant to the contract. This was a proper and orderly way to proceed which is consistent with a free and constitutional society.

A. Emmerson's Act, in Filing Her Action, Was Perfectly Legal – Indeed Her Right to Petition the Courts Is Fundamental.

The right to petition a court for redress of grievances is a fundamental right protected by the First Amendment to the United States Constitution. *See United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *E. R. R. President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Oregon Natural Resources Council v. Molhla*, 944 F.2d 531, 533-34 (9th Cir. 1991). The Montana Constitution also guarantees the right of access to the courts to seek full legal redress, and provides: "Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character." Mont. Const., Art. II, § 16; *see also Kortum-Managhan v. Herbergers NBGL*, 2009 MT 79, ¶ 25, 349 Mont. 475, 482, 204 P.3d 693, 699 ("[T]he rights to trial by jury [Art. II, § 26] and access to the courts [Art. II, § 16] are fundamental constitutional rights that deserve the highest level of court scrutiny and protection.").

In addition to her constitutional right, Emmerson had a statutory privilege to ask the court to resolve her questions regarding the validity of the Walker/Emmerson Agreement – a privilege that is codified at MCA § 27-8-203 ("A contract may be construed either ***before*** or after there has been a breach thereof.") (emphasis added). As one court has explained:

> Declaratory relief is a unique statutory remedy that serves an "important social function of deciding controversies at their inception." . . . Declaratory judgments permit determination of a controversy "before obligations are repudiated or rights are violated," essentially allowing one who walks in the dark to turn on the light before – rather than after – one steps in a hole.

Cincinnati Ins. Co. v. Franck, 621 N.W.2d 270, 273-74 (Minn. Ct. App. 2001).

Given Emmerson's right to seek a declaratory judgment regarding the validity of the Walker/Emmerson Agreement, it follows that Johnson cannot be held liable in tort for advising Emmerson to exercise that right. All Johnson did was counsel Emmerson to take a perfectly legal step – to seek recourse through the courts – and to support her financially in taking that step. The fact that Johnson provided financing for Emmerson, who otherwise might not have been able to afford her suit, does not give rise to tortious interference because, as noted above, Emmerson had a perfect right to seek a court interpretation. If it were otherwise, every contingency fee lawyer, advancing time and costs for clients who could not otherwise afford a court action, would be subject to tortious conduct allegations similar to those made here.

The district court erred when it failed to accord sufficient weight to Emmerson's and Johnson's statutory and constitutionally-protected rights to seek legal redress through the courts. Indeed, "sufficient weight" is an understatement

here – the district court's opinion is entirely devoid of any reference to that right.

Such "public policy considerations" must be made before imposing liability for tortious interference. *See Phillips,* 187 Mont. at 424, 610 P.2d at 157 (1980).

B. Tort Claims Which May Chill the Exercise of the Fundamental Right of Court Access Are Disfavored.

Courts have universally imposed very high thresholds for tort actions which implicate the filing of litigation, because of the chilling effect such actions might have on the exercise of fundamental rights. While most states, including Montana, recognize the torts of abuse of process and malicious prosecution, these theories are carefully constricted. For example, in *DeVaney v. Thriftway Marketing Corp.*, 953 P.2d 277, 284 (N.M. 1997), the New Mexico Supreme Court said:

> Because of the potential chilling effect on the right of access to the courts, the tort of malicious prosecution is disfavored in the law.

Courts have been especially careful to limit any attempt to recover under some other, and less protective, theory which does not incorporate the substantive and procedural requirements of abuse of process or malicious prosecution. Thus, in *Curiano v. Suozzi*, 469 N.E.2d 1324 (N.Y. 1984), the court refused to allow plaintiff to assert a claim dressed up as something other than malicious prosecution against the defendant for filing a prior suit:

> By using it [the other claim], plaintiffs seek to avoid the stringent requirements we have set for traditional torts, such as malicious prosecution, requirements which are necessary to effectuate the strong public policy of open access to the courts for all parties without fear of reprisal in the form of a retaliatory lawsuit. To permit plaintiffs' action to continue under these circumstances would create a situation where the litigation could conceivably continue *ad infinitum* with each party claiming that the opponent's previous action was malicious and meritless.

Curiano, 469 N.E.2d at 1328.[5]

One need look no further than this case for a palpable example of the extreme chilling effect that may result from an uncareful application of a tort theory. In this case, the district court awarded a total of $150,000 against Johnson for infliction of emotional distress. This award was based on the ephemeral testimony of Ace and Rae Walker that they suffered stress. Ace Walker, for example, testified that this is "the

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[5]The U. S. Supreme Court was very sensitive to the chilling effect of a large damage award in *National Association for the Advancement of Colored People v. Claiborne Hardware Co.*, 459 U.S. 898 (1982). That case involved an award of "damages for all business losses that were sustained during a seven year period," imposing joint and several liability on the national NAACP, the local chapter and on Charles Evers. The local chapter of the NAACP had organized a boycott of a business engaged in racial segregation. The damages stemmed from a civil claim asserting illegal conspiracy and "malicious" interference with respondent's businesses. *Id.*, at 886, 920. Even though there had been unprotected acts of violence associated with the boycott, the Court found that much of the activity claimed as wrongful was protected by the First Amendment. It held that very close scrutiny of the damage award was required, stating that constitutional freedoms, least of all the Bill of Rights, cannot be defeated by "insubstantial findings of facts screening reality." *Id.*, at 924.

most troubling thing that we've had in our family since we've been married," that "[w]e don't have the use of the property that we wanted to," that "[i]t's caused some stress between Rae and I," and "stress with the kids and us, frustration because we can't do what we planned to do. . . . We live with it every day." [Transcript, 105.] Mrs. Walker echoed this testimony and added, "[i]t's difficult to be a good parent when this is hanging out here. . . ." [Transcript, 175.][6]

No medical records were introduced, nor was there evidence of any consultation with medical doctors or psychologists regarding these stresses. [Transcript, 137-138.][7] Ironically, the district court's award of $150,000 in emotional distress damages was based almost solely on the fact that Walker testified that he thought he was entitled to $50,000 damages because Johnson testified that he believed his emotional distress damages (for his counterclaim) were $50,000. [*See* Order, CRR 99, at 26.] In short, the evidence of emotional distress was very thin.

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[6]There was odd testimony regarding the Walkers' 14-year-old son. The Walkers claimed he was angry and because he wanted to be a "rancher, cowboy, farmer," he began going on-line, searching for real estate. [Transcript, 175.] Ace Walker testified that his son "thinks I've exercised poor judgment by getting involved with Valerie Emmerson and doing this exchange and tying this all up." [*Id.*, at 105.]

[7]Ace Walker claimed that he had talked to "Chaplains in the Navy" when he was in Iraq, but gave no details other than "if you looked at my medical records, you'd see that the VA screened me for PTSD, . . . and found no evidence of it." [Transcript, 137.]

This Court recently cleared up the previous case law which "created confusion as to what, if any, standard applies when evaluating damages for parasitic emotional distress claims." *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 66, 351 Mont. 464, 482-83, 215 P.3d 649, 664. *Jacobsen* now makes it clear that, because Walkers' claim is "parasitic," they do not have to meet the "serious or severe" standard for emotional distress damages under *Sacco v. High Country Independent Press*, 271 Mont. 209, 896 P.2d 411 (1995).[8]

Given this relaxed standard for proof of parasitic emotional distress, there is all the more reason to be concerned about the extreme chilling effect that may result from a loose application of the tortious interference test to activities that implicate fundamental rights of court access.

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[8]Zamore, 1 Business Torts (2008 ed.), makes the following statement regarding damages in the context of a tortious interference claim:

> Damages generally must be proven and cannot be based upon rank speculation. Even though the plaintiff can prove intentional conduct aimed at interfering with a business relationship, there can be no recovery if there must be a leap of deduction from the evidence to the alleged damages. Thus, a claim that produces no injury is not actionable.

Id., § 11.03[6], at 11-40 (citation omitted). This, however, is not the standard the district court applied, nor does this Court's decision in *Jacobsen* seem to call for even this modest level of rigor with respect to parasitic emotional distress claims.

In this case, $150,000 in emotional distress damages were awarded on the thinnest of evidence, after the district court applied an insufficiently stringent test for tort liability, without consideration of the constitutional rights at issue.

1. In Montana a Person's Right to Seek Legal Redress Is Carefully Protected.

Although this Court has not directly faced the issue of whether a tortious interference claim may be based on the mere filing of litigation, it has recognized the potential to chill the exercise of the fundamental right to seek legal redress. Its decisions are at the forefront in protecting the right of court access. *See Plouffe v. Mont. Dept. of Pub. Health and Human Servs.*, 2002 MT 64, ¶ 16, 309 Mont. 184,189-90, 45 P.3d 10, 14. Given its other precedents and its vigilance in protecting the right of court access, it seems likely that this Court would follow the lead of the New York courts in applying the stringently protective standards of malicious prosecution and/or abuse of process to cases such as this. As the New York court said in *Curiano*, adherence to the strict requirements for malicious prosecution is "necessary to effectuate the strong public policy of open access to the courts . . . without fear of reprisal in the form of a retaliatory lawsuit." *Curiano*, 469 N.E.2d at 1328. It is equally as appropriate in Montana to confine tort remedies to these standards because this Court has, over the years, developed tests for these claims that

are suitably protective of a litigant's right to seek court access.

In Montana, for example, a malicious prosecution case may not be sustained unless there was a lack of probable cause and the defendant was actuated by malice. *Plouffe v. Mont. Dept. of Pub. Health & Human Servs., supra*, 309 Mont. at 189-90, 45 P.3d at 14. Likewise, to sustain a case for abuse of process, a claimant must show: (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding. *Brault v. Smith*, 209 Mont. 21, 28-29, 679 P.2d 236, 240 (1984). These purposely stringent requirements have been consciously developed to strike a balance between a litigant's fundamental right to court access and the rare case where such access is maliciously abusive. *See Seipel v. Olympic Coast Investments*, 2008 MT 237, 344 Mont. 415, 425, 188 P.3d 1027, 1034 (Justice Warner dissenting) ("Because of its potential chilling effect on the right of access to the courts, the tort of abuse of process is disfavored, and must be narrowly or strictly construed to insure the individual a fair opportunity to present his or her claim.").

This Court implicitly recognized the litigation privilege in *Hughes v. Lynch,* 2007 MT 177, ¶ 1, 338 Mont. 214, 215, 164 P.3d 913, 915. Hughes sued Lynch for malicious prosecution, abuse of process, and tortious interference. *See id.*, ¶ 1, 338 Mont. at 215, 164 P.3d at 915. Hughes's claims were based on the fact that Lynch had filed a complaint against Hughes with the Human Rights Commission, alleging

unlawful gender discrimination. *See id.*, ¶ 2, 338 Mont. at 215, 164 P.3d at 915. The district court granted summary judgment for Lynch, and Hughes appealed. *See id.*, ¶ 1, 338 Mont. at 215, 164 P.3d at 915. This Court affirmed the district court's conclusion that Hughes had not committed tortious interference and explained:

> We agree with the District Court that there is no evidence in the record to suggest that Lynch's acts were calculated to cause damage to Hughes. In this regard, Hughes again directs our attention to the Ronco affidavit; however, whether or not Lynch believed that "a lot of money could be made from [her discrimination claim]," [as Ronco stated in her affidavit,] ***she still was entitled to seek both redress of and damages for the alleged discrimination.***

Id.,¶ 29, 338 Mont. at 224, 164 P.3d at 921 (emphasis added). In other words, this Court held that even if Lynch hoped to make money through her suit against Hughes, she was entitled to have her day in court, and recognized that litigation is a justified activity that cannot give rise to tort liability.

2. Cases in Other States Strongly Support the Fundamental Right to Petition the Courts.

In addition to New York, discussed above, other states, including Florida, Texas and Massachusetts, have applied the "litigation privilege" to cases alleging tortious conduct, including intentional interference with contractual relations.

Florida has very strong protections against tortious interference claims. In *Boca Investors Group, Inc. v. Potash*, 835 So.2d 273 (Fla. 2002), a real estate

investment corporation brought a tortious interference action. Boca Investors alleged tortious interference with a business relationship and sought to recover damages as a result of defendants' filing three lawsuits that disrupted Boca Investors' efforts to purchase Fisher Island property. The defendants moved to dismiss based on the absolute litigation privilege and the trial court granted the motion based on *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell v. U. S. Fire Ins. Co.*, 639 So.2d 606 (Fla. 1994). Citing *Levin* on the litigation privilege, the *Boca* court stated:

> [A]bsolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement, or other tortious behavior such as the alleged misconduct at issue, so long as the act has some relation to the proceeding.

Boca, 835 So.2d at 274.

The *Levin* court in Florida had established, in 1994, this absolute litigation privilege based on the following policy consideration:

> Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.

Levin, 639 So.2d at 608.

Following *Levin* and *Boca*, the Florida Supreme Court in *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So.2d 380 (Fla. 2007), applied the *Levin*

absolute litigation privilege to statutory claims filed under the Consumer Collection Practices Act and the Deceptive and Unfair Trade Practices Acts of Florida. The court quoted the following language from *Levin*: "The rationale behind the immunity afforded to defamatory statements is equally applicable to *other misconduct* occurring during the course of a judicial proceeding." 639 So.2d at 608 (emphasis added by the *Echevarria* court). The court cited the important policy concern of the "perceived necessity for candid and unrestrained communications in those proceedings, free of the threat of legal actions predicated upon those communications, . . . [as] the heart of the rule." *Id.* at 384.

The strength of the *Levin* holding was also stressed in *Jackson v. BellSouth Telecommunications, Inc.*, 181 F. Supp.2d 1345 (S. D. Fla. 2001), in which the court dismissed the defendant's claims of conspiracy to defraud and tortious interference with advantageous contractual and business relationships. The court noted, citing the *Levin* immunity language and U. S. Supreme Court decision in *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985): "[T]he essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action" and is thus "an immunity from suit rather than a mere defense to liability." *Jackson*, 181 F.Supp.2d at 1363 (quoting *Mitchell*, 472 U.S. at 525-526); *see also Microsoft Corp. v. Big Boy Distribution, LLC*, 589 F.Supp.2d 1308, 1322 (S.D. Fla. 2008).

Texas also recognizes a "litigation privilege." The court in *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1268 (5th Cir. 1991), cited the lower court's order stating:

> In entering summary judgment against Shortstop on its tortious interference claim, the court canvassed the entire wardrobe of Texas suits on the privilege issue and, after a thorough analysis, concluded that ***a litigant is privileged to file a lawsuit which interferes with the contract of another*** so long as the litigant is asserting a "colorable claim," or at least believes in good faith that it is asserting a colorable claim.

(Emphasis added).

The court looked at the leading Texas case, *Sakowitz, Inc. v. Steck*, 669 S.W.2d 105 (Tex. 1984), and the more recently decided *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931 (Tex. 1991), and concluded that Texas law probably requires that a suit, to be privileged, must be filed in ***good faith*** (regardless of whether there is a "colorable" claim or not). *See also Brooks Automation, Inc. v. Blueshift Technologies, Inc.*, 2006 WL 307948 (Mass. Super. 2006).

The Restatement (Second) of Torts, § 767, which this Court applied in *Bolz v. Myers*, 200 Mont. 286, 294-95, 651 P.2d 606, 610-11 (1982), and which the district court cited below [*see* Order, CRR 99, at 24], likewise provides that the filing of a lawsuit can only be the basis for a tortious interference claim if there is an absence

of a good-faith belief in the merits of the litigation. Restatement (Second) of Torts, § 767, Comment on Clause (a). The Restatement further says in Comment on Clause (d):

> Usually the actor's interest will be economic, seeking to acquire business for himself. An interest of this type is important and will normally prevail over a similar interest of the other if the actor does not use wrongful means.

Clearly the simple act of filing a lawsuit, or inducing the filing of a lawsuit, does not amount to "unlawful means." *See* Restatement (Second) of Torts, § 768, Comment on Clause (b) (predatory acts amount to unlawful means but mere persuasion does not).

C. There Was No Allegation or Finding Here That Emmerson's Suit Was Malicious or an Abuse of Process.

There was no allegation by Walkers, or by any party, that Emmerson's lawsuit lacked probable cause or was otherwise malicious, or that it constituted an abuse of process; nor was there any finding by the district court to that effect. Moreover, the district court explicitly found that Johnson's actions were not malicious. [Transcript, 310.]

The irony here is that Emmerson acted perfectly legally, that no one claimed otherwise, but that Johnson is penalized in damages for simply advising and financially supporting her to do exactly what she was entitled to do anyway.

II. JOHNSON'S ACTS IN INDUCING EMMERSON TO SEEK A COURT INTERPRETATION OF THE CONTRACT CANNOT PROVIDE A BASIS FOR TORTIOUS INTERFERENCE WITH CONTRACT.

Given that Emmerson's act in filing the declaratory judgment action was perfectly legal, Johnson's acts in urging her to seek a declaratory judgment action and in volunteering to pay her legal fees cannot serve as a basis for an intentional interference claim.

In *Eddy's Toyota of Wichita, Inc. v. Kmart Corp.*, 945 F. Supp. 220, 222 (D. Kan. 1996), the court found that the actions of a third party which induced litigation by parties to a contract is privileged and cannot give rise to tort liability. In that case, Eddy's sued Kmart for tortious interference with Eddy's sublease with a third party. Eddy's and Kmart had neighboring businesses on property they leased from the same landlord, and Eddy's planned to sublease its property to an adult bookstore. *See id.*, at 221. Kmart was opposed to an adult bookstore being located next to its business. *See id.* Among other things, Eddy's claimed that Kmart induced Eddy's landlord to file suit against Eddy's based on the allegation that the proposed sublease violated Eddy's lease with its landlord. *See id.*, at 221, 225. Indeed, Eddy's argued that the landlord acted as Kmart's agent, based in part on evidence that the landlord might have been financially backed by Kmart. *Id.*, at 224. As here, Kmart did not induce a breach – it simply induced the landlord to file a legal action to block the adult

bookstore.

The court applied Kansas law which, like Montana, requires that a plaintiff prove a defendant was not justified in interfering with the contract at issue. *See id.*, at 222-23. With respect to the lawsuit by the landlord against Eddy's, the court held:

> Efforts to seek remedies through the judicial process are protected by the First Amendment right to petition the government for redress of grievances. Even if Eddy's ultimately could prove that [its landlord] acted as Kmart's agent in bringing the state court lawsuit, Kmart's redress to the courts to resolve its contractual dispute with Eddy's is privileged even if it interfered with Eddy's lease, unless Kmart maliciously filed the lawsuit.

Id. at 225 (citations omitted) (emphasis added). The court found that Eddy's claim was really a claim for malicious prosecution, not tortious interference, and that the claim was barred by the statute of limitations. *See id.*, at 225-26.

In *Nesler v. Fisher and Co.*, the Supreme Court of Iowa was faced with a case very similar to this one. 452 N.W.2d 191 (Iowa 1990). Specifically, plaintiff Nesler purchased a building in Dubuque and obtained "tentative commitments from several county agencies to relocate their offices" to Nesler's building once it was renovated. *Id.* at 193. When the county's current landlord, Louis Pfohl, learned that he was going to lose tenants to Nesler, Pfohl persuaded one of his tenants to sue Nesler based on the Nesler building's allegedly inadequate access for the handicapped. *See id.*

The suit was brought by Pfohl's attorney on behalf of the county agency, and Pfohl may also have paid for the lawsuit. *See id.* Pfohl himself also sued the county and claimed it was required to accept his rental bid. *See id.*

After trial, the jury found that Pfohl interfered with existing and prospective contracts of Nesler. *See id.* However, the court granted defendants' motion for judgment notwithstanding the verdict because there was insufficient evidence of certain elements of his claim. *See id.* The Iowa Supreme Court concluded that the trial court erred in doing so, and ordered that a new trial be held. *See id.*, at 196. The court therefore addressed certain trial issues, including the proper instructions on the claims for interference with an existing contract and interference with a prospective contract. On both counts, the trial court instructed the jury that Nesler must prove, among other things, that the "defendants intentionally and improperly interfered with the contracts." *See id.*, at 196-97. The Iowa Supreme Court held:

> This case is quite unique in that none of the defendants' acts were tortious in themselves. As the defendants point out, they had a legal right to file or encourage lawsuits and to lodge complaints with the city building inspector. But they may not do so with impunity, as they seem to suggest. It all depends on their motivation. [The jury instructions] stated that the plaintiffs must show that the defendants "intentionally and improperly" interfered with the plaintiff's contracts or prospective contracts. However, [the instructions] did not define "improper" nor did they explain the circumstances under which otherwise legal

> acts, such as the filing of complaints or civil suits, may constitute interference. Without such guidance, the jury would be free to find interference ***based solely on the filing of the lawsuits*** and the building complaints without regard to the motivations behind them.

Id., at 197-98 (emphasis added). Thus, the court recognized that neither filing a lawsuit nor encouraging someone else to do so can be the basis for tortious interference. Notably, the court did not require different standards depending on whether the interference claim was based on Pfohl inducing a third party to file suit or on Pfohl's own lawsuit against the county.

The court held that on retrial, the jury should be instructed that Pfohl would be liable for interference only if his acts were intentional and improper. *See id.* at 199. The court, relying on the Restatement (Second) of Torts, § 767, held that filing a lawsuit can be the basis for tortious interference only if there is an "absence of a good-faith belief in the merits of the litigation." *Id.* at 198.

Likewise here, even if Johnson encouraged Emmerson to file suit, these acts are fully protected unless the lawsuit was filed maliciously or without a good-faith belief in its merits. No such allegation was made in this case, and the court did not so find. In fact, the court explicitly stated that Johnson had not acted with malice. Johnson knew he could not acquire Emmerson's property if the Walker/Emmerson Agreement was valid. [*See* Transcript, 230-231.] Johnson's acts of advising

Emmerson to seek legal counsel and paying her legal fees are protected because, in doing so, Johnson was taking steps within the civil legal system to find out if the Walker/Emmerson Agreement was actually valid, and, as the district court explicitly found, he was not actuated by malice.[9]

III. THE DISTRICT COURT ERRED IN ITS APPLICATION OF THE TEST FOR TORTIOUS INTERFERENCE BECAUSE IT FAILED TO CONSIDER THE FUNDAMENTAL RIGHTS OF THE PARTIES TO SEEK LEGAL REDRESS.

In this case, the district court's mechanical application of the standard "tortious interference" test, as set forth in the case of *Hardy v. Vision Service Plan*, 2005 MT 232, 328 Mont. 385, 120 P.3d 402, was insufficiently rigorous to protect the fundamental litigation rights of Emmerson and, derivatively, Johnson. In other words, the district court failed to recognize the critical importance of litigation activity, and, without rigorous analysis, simply applied the routine "tortious interference" test without any consideration at all of the critical rights of court access that are so fundamental in a free society.

The district court, in applying the standard test for a tortious interference claim,

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[9]Here, Emmerson told Johnson that she "felt bad" because the Walker/Emmerson Agreement was based on disparate values. [Transcript, 224-225.] Johnson told Emmerson, truthfully, that the only way he could close on Emmerson's property was if a court determined that the Walker/Emmerson Agreement was invalid. [*See id.*, 230-231.] Under the Restatement (Second) of Torts, § 772, such conduct is not improper.

characterized the *Hardy* test as follows:

> Tortious interference requires that the acts were intentional and willful, were calculated to cause damage to plaintiff in his or her business, were done with the unlawful purpose of causing damage or loss, without right or justifiable cause on the part of the actor and that actual damages and loss resulted. *Hardy v. Vision Service Plan*, 2005 MT 232; 328 Mont 285; 120 P.3d 402.

[*See* Order, CRR 99, at 24.] Although the district court recited "without right or justifiable cause" as an element of a claim for tortious interference, this was only a glancing reference. The court failed to recognize Johnson's constitutionally-protected right to seek redress through the courts when it held that Johnson had "no social interest that could be protected . . . ." [*Id.*, at 25.] That holding is contrary to Montana law, which requires the court to examine "public policy considerations" in determining whether interference is justified. *Phillips,* 187 Mont. at 424, 610 P.2d at 157. Clearly, constitutional rights are public policies that must be considered before imposing tort liability.[10]

In the seminal case, *Bolz v. Myers* (1982), 200 Mont. 286, 651 P.2d 606, this

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[10]As noted above, this Court balanced the constitutional right to litigate against a tortious interference claim in *Hughes,* 2007 MT 177, ¶ 29, 338 Mont. at 224, 164 P.3d at 921 (granting summary judgment against Hughes's claim for tortious interference and stating that even if Lynch hoped to make money through her claim against Hughes, Lynch "still was entitled to seek both redress of and damages for" that claim).

Court specifically relied on factors in Restatement (Second) of Torts, § 767, including:

> (e) **the social interests in protecting the freedom of action of the actor** and the contractual interests of the other. . . .

Id. (emphasis added).

Here, the district court did not make the required rigorous findings when it found Johnson liable for tortious interference. Instead, the court merely held that Johnson had "no social interest that could be protected," without giving any consideration to Johnson's (or Emmerson's) constitutional rights. [Order, CRR 99, at 25.]

If Emmerson's conduct was proper – and it was – there is no basis for imposing liability on Johnson for assisting Emmerson with her declaratory judgment action. *See Pospisil v. First Nat'l Bank of Lewistown,* 2001 MT 286, ¶ 20, 307 Mont. 392, 397-98, 37 P.3d 704, 707-08 (holding that legal acts, "[s]tanding alone, . . . do not give rise to any presumption or inference that the acts were done to harm [plaintiff]"); *Taylor v. Anaconda Fed. Credit Union,* 170 Mont. 51, 56, 550 P.2d 151, 154 (1976) (holding that malice (*i.e.,* "the intentional doing of a wrongful act without justification or excuse") "is not presumed and cannot be inferred from the commission of a lawful act").

In *Montana Supreme Court Commission on the Unauthorized Practice of Law v. O'Neil*, 2006 MT 284, ¶ 48, 334 Mont. 311, 323-24, 147 P.3d 200, 209, this Court rejected O'Neil's claim that the Bar wrongfully interfered with his contract with outside jurisdictions and businesses when it informed the CS & K Tribal Court that O'Neil was not licensed to practice law before the Blackfeet Tribal Court, and the CS & K Tribal Court then terminated O'Neil's right to practice before it. This Court stated:

> Here, Brandborg's letters to U. S. West Dex and representations to CS & K Tribal Court were not "wrongful" acts, nor were they committed "without justification or excuse." Brandborg and the Bar have a responsibility to tell the truth regarding the status of those admitted or not admitted to practice law in this State. . . . As the Bar points out in its brief on appeal, the social interests in protecting the freedom of action of the Bar to tell the truth outweigh O'Neil's claimed right to misrepresent his status as a licensed attorney to the public.

Id., 334 Mont. at 323-24, 147 P.3d at 209 (emphasis added).

This Court stressed the Bar's obligation to "foster high standards of integrity, learning, competence, public service and conduct . . . and, concomitantly, to protect the public from those who do not meet these standards." *Id.*, 334 Mont. At 324, 147 P.3d at 209.

Just as the Bar had a "right and justifiable cause" to inform the public regarding

O'Neil's fraudulent status, Emmerson and Walkers had the right to petition the court.

Zamore, 1 Business Torts (2008 ed.), makes it clear that a claim for tortious interference must be supported by conduct that is wrongful in itself:

> The means employed by the defendant in connection with the interference can also be an important factor. Courts have been far more ready to find that the defendant's conduct is privileged if he caused the interference by the use of otherwise lawful means (such as persuasion or routine business practices) than if he used means considered wrongful or unlawful in themselves. Consequently, although two defendants may possess the same purpose for intentionally interfering with a contract, one defendant's conduct may be legally justified if he employs proper means to accomplish his purpose, while the other actor may be liable for tortious interference if he uses improper means to accomplish the same purpose.

Id. at § 11.04[1] at 11-51 (emphasis added). Under this test the lawful conduct of Emmerson and Johnson in filing the declaratory judgment action does not provide the basis for a tortious interference claim.

A typical example of the wrongful conduct necessary to make out a claim for tortious interference is found in *Bolz v. Myers, supra.* In that case this Court noted that the defendant's acts not only breached his contract, but went further and intentionally interfered with Bolz's contractual business relationships with third parties. This Court considered these acts "outrageous," noting that Myers "went far out of his way during and after the transfer of the business to destroy Bolz's business

relationships with customers; . . . false advertising, misrepresenting Bolz's credit record, declaring Bolz to be an imposter to others . . . ." 200 Mont. at 295, 651 P.2d at 610-11. In contrast here, Johnson expected the court to decide the declaratory action in a relatively short period of time. [Transcript, 230-231.] In other words, Johnson had a good-faith belief in the merits of the action and expected Emmerson to bring the action to a definitive adjudication. *See* Restatement (Second) of Torts, § 767, Comment on Clause (a). Johnson did not engage in wrongful acts of the type involved in *Bolz v. Myers*.

Because neither petitioning the courts for redress of grievances nor giving truthful information or advice can form the basis of a claim for tortious interference, the district court erred when it held Johnson liable for tortious interference.

IV. JOHNSON'S FINANCIAL ASSISTANCE TO EMMERSON AND HIS BACKUP OFFER CANNOT FORM THE BASIS OF TORT LIABILITY.

The district court's finding of tortious interference by Johnson was primarily based on Johnson's acts related to Emmerson's declaratory judgment action. The district court, however, also relied on several additional facts. These include the fact that Emmerson may not have filed the declaratory judgment action if she had to pay her own legal costs. [*See* Order, CRR 99, at 16.] The court also relied on Johnson's backup offer to Emmerson after Johnson learned of the Walker/Emmerson

Agreement. These add no support for the district court's ruling.

Johnson's financing of Emmerson, who may not have otherwise been able to afford this litigation, was not malicious or otherwise improper. Indeed, lawyers often take cases on a contingency basis, paying costs along the way, for clients who might not otherwise be able to afford the expense of litigation. This has never been deemed to be improper. Johnson's financing of Emmerson's case is no different.

Moreover, the agreement between Emmerson and Johnson was simply a real estate backup offer. This is common practice and has never been deemed to provide the basis for tortious interference with contract. *See Randolph V. Peterson, Inc. v. J. R. Simplot Co.*, 239 Mont. 1, 3-4, 778 P.2d 879, 880-81 (1989).[11]

In *Rappahannock Pistol & Rifle Club, Inc. v. Bennett*, 262 Va. 5, 546 S.E.2d 440 (Va. 2001), a third party made a backup offer on a real estate contract. This resulted in the seller accepting the backup offer and breaching the initial contract. The court found, however, that the third party's action in making the backup offer did not constitute tortious interference with contract. *Id.* at 445. The court explicitly found that backup offers are routinely used in the real estate business, stating:

> Three attorneys versed in real estate matters testified

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[11]In any event, the backup offer did not "interfere" with Walkers' contract in any way because Emmerson never breached her obligation to Walkers. The district court ruled that the contract was enforceable, and Emmerson then performed.

> without contradiction that the use of backup contracts is an accepted practice. . . . Edwards, counsel for [seller] described a backup contract as "an offer made by a party who wants to buy the same piece of property that's already been placed under contract with another party," and he testified that the use of backup contracts is recognized in "real estate circles." . . . Broaddus, counsel for the Bennetts, testified that the use of backup contracts is "certainly not unusual" and is especially appropriate when the contract backed up provides that time is of the essence. . . . Stamm, another counsel for the Bennetts, testified that he had closed "[m]any, many" backup contracts. And Broaddus testified that he and Stamm "suggested" to the Bennetts that they might "well wish to consider submitting what is commonly called a 'backup offer' to the seller."

Id., 262 Va. at 16, 546 S.E. 2d at 446; *see also Barco Holdings, LLC v. Terminal Investment Corp.*, 967 So.2d 281 (Fla. App. 3rd Dist. 2007).

In *Randolph V. Peterson, Inc. v. J. R. Simplot Co., supra*, this Court held that defendant Harnischfeger Corp., a manufacturer and dealer in heavy equipment, did not interfere with a contract between J. R. Simplot Co., a mining company, and plaintiff Randolph V. Peterson, Inc. ("RVP"), a heavy equipment broker who had a non-exclusive agreement to broker the sale of a used mining shovel. Circumventing Peterson, Simplot and Harnischfeger agreed that Simplot could trade in the shovel in exchange for a credit toward the purchase of a new shovel. 239 Mont. at 3-4, 778 P.2d at 880-81. Both Harnischfeger and Simplot realized that Harnischfeger might then turn around and sell the used shovel to Golden Sunlight Mines, a company

which had previously had dealings with Peterson regarding the used shovel. The Court explained:

> When Harnischfeger learned of RVP's efforts to market [Simplot's] shovel, it immediately inquired of Simplot whether the shovel could still be taken on trade. Receiving assurances from Simplot that the brokerage agreement with RVP allowed the trade-in, Harnischfeger then continued to negotiate with Golden Sunlight. The subsequent sale of the shovel was no more than a reasonable and legitimate business transaction.

Id., at 9-10, 778 P.2d at 884; *see also Pospisil,* 2001 MT 286, ¶ 20, 307 Mont. at 397-98, 37 P.3d at 707-08; *Taylor,* 170 Mont. at 56, 550 P.2d at 154.

Likewise, here, while Johnson eventually learned of the Emmerson/Walker Agreement, Emmerson also indicated to Johnson that she "felt bad" about the disparate values upon which that agreement was based. [Transcript, 224-225.] The subsequent agreement between Emmerson and Johnson was simply a backup offer that never materialized. This was a reasonable and legitimate business transaction that provides no basis for a claim of tortious interference with contract.

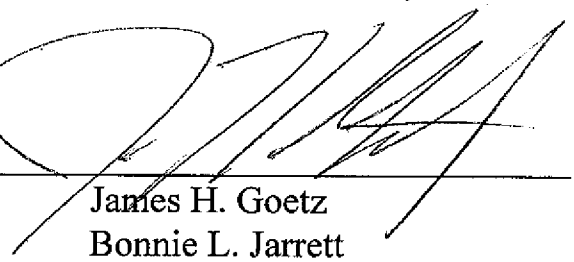
CONCLUSION

The district court erred when it failed to recognize the constitutionally-protected right to seek redress through the courts when it found Johnson tortiously interfered with the Walker/Emmerson Agreement by assisting Emmerson in her

declaratory judgment action. This Court should reverse and remand for further proceedings on this issue.

DATED this 2nd day of December, 2009.

GOETZ, GALLIK & BALDWIN, P. C.



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced (except that footnotes and quoted and indented material are single spaced); with left, right, top and bottom margins of 1 inch; and that the word count calculated by Microsoft WordPerfect does not exceed 10,000 words, excluding the Table of Contents, Table of Citations, Certificate of Service and Certificate of Compliance.

DATED this 2nd day of December, 2009.

GOETZ, GALLIK & BALDWIN, P.C.

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I certify under penalty of perjury that the foregoing document was served upon the following counsel via first class mail on the 2nd day of December, 2009.

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